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**Some Thoughts on McDonald v. Chicago and the Fourteenth Amendment**

*By* *Tim Dunkin*  Wednesday, June 30, 2010

Like many other conservatives, I cheered the Supreme Court’s decision on Monday in which it overturned the bases upon which Chicago’s ordinance banning the ownership of handguns were predicated, and by extension, upheld the principle that the right to keep and bear arms is an individual right. The Supreme Court, following upon its earlier *Heller* decision, has firmly ensconced the 2nd amendment into the panoply of [American](http://canadafreepress.com/index.php/article/24879) liberties. Finally, it seems, the right to the individual, personal ownership and use of weapons has taken its rightful place alongside our freedoms of speech, religion, and the press as an indubitably constitutional liberty affirmed by that document.

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One question that seems to trouble many conservatives and libertarians is whether this decision, which essentially requires that the states respect the 2nd amendment (which is, as we know, an amendment to the *federal* Constitution), is just another step in the consolidation of power from the states and to the federal government. One example of this concern is provided by Vox Day, who writes for *World Net Daily*, and who also has his own [blog](http://voxday.blogspot.com/2010/06/guns-are-individual-right.html),

“*On the other, I am opposed to increased federalization even in a good cause. Although since the States haven’t been sovereign since the political debate was settled by mass slaughter, I suppose it’s a bit late to worry about that now. And since the federal government isn’t about to stop ruling over the state and local governments with an iron hand, this is a better decision than the most likely alternative.*”

The problem with this argument is that affirming the 2nd amendment as a liberty which the states cannot infringe does not amount to federalization. Indeed, it is completely inline with what the Constitution itself says, as well as with the intentions of the men who crafted that Constitution. The essential crux of several of the arguments forwarded by the majority in the *McDonald* decision centered about the 14th amendment, the first section of which reads,

“*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*.”

The operative clauses of concern are the “Privileges or Immunities” and the “Due Process.” Essentially, what this amendment did with this language was to clarify that none of the states could infringe upon the rights of the citizens of the United States. No state has to power to overrule federal guarantees of our liberties. The short and simple answer is that a Supreme Court ruling which affirms the inability of states to infringe federal guarantees of individual liberties, in line with the plain wording of this amendment, cannot be out of line with the Constitution. It is constitutional by virtue of being drawn from an amendment which is incorporated into that document. A portion of the Constitution cannot be “unconstitutional” by any stretch of the imagination.

That is all well and good, but many would still argue that the 14th amendment, despite being enshrined as part of the Constitution, is still out of step with the principles originally intended for that document, such as the federalism affirmed in the 9th and 10th amendments. As support for the practical effects of the supposed overreach entailed by the 14th amendment, many would point to the obvious abuses of the “Due Process” clause by liberal courts that have sought to systematically introduce all kinds of invented “rights” at the federal level—which states are then unable to do anything about because the states cannot overturn federal protections for our rights.

However, Justice Thomas’ concurring opinion helps to redirect attention back to the “Privileges or Immunities” clause, and the “incorporation” arguments made by the remaining majority generally coincide with Thomas’ conclusion, which is essentially that the federal government can protect fundamental liberties that were recognized as such at and before the time the amendment was ratified. Hence, these fundamental liberties (including the right to keep and bear arms) are considered to be legitimately protected by the 14th amendment, whereas much of the more recent “rights discovery” nonsense that agitates conservatives is called into question. Possibly outflowings from this could include overturning affirmative action, protecting us from the imposition of [health care](http://canadafreepress.com/index.php/article/24879) as a “constitutional right,” and possibly even calling into question *Roe v. Wade*, if we can find some Justices gutsy enough to make the attempt.

So is the prohibition against state infringement upon rights affirmed by the federal government an affront to states’ rights? Does the federal government have the legitimate power to prevent states from intruding upon our gun rights, or our free speech rights, or any other true rights?

One has to question why this should be an issue, in light of the fact that the 2nd amendment, as well as the other portions of the Bill of Rights, appears in the *federal* Constitution.  Indeed, the fact that the rights listed in amendments one through eight are held by the people, apart from their individual states, seems to be implied in the 9th amendment,

“*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*.”

The first time the term “right” appears in the Constitution in the context of political and civil liberty, and the first time the term “[freedom](http://canadafreepress.com/index.php/article/24879)” appears at all, are in the 1st amendment, and they are used subsequently throughout the following amendments in the Bill of Rights. Hence, if we want to take the text of the 9th amendment at face value, we will have to accept that the liberties enshrined within the Bill of Rights are retained by the people—not by the respective states, nor are they held by the people through their respective states, but instead as citizens of the United States. The 9th amendment is obviously referring to the rights enumerated in the previous amendments, and has *already* “federalized” these rights. Hence, there is no real case to make from a 10th amendment federalism standpoint that the 14th amendment, and the recent Supreme Court affirmation of a federal right to keep and bear arms, are an affront to the original intention of the Founders. Per the 9th amendment, these liberties (and presumably the ability to protect them by law) are among the powers delegated to the United States by the Constitution.

And yes, the Founders certainly did intend for the two-tiered citizenship scheme that was affirmed (rather than being invented) by the 14th amendment, which was noted by Justice Miller in his opinions in the *Slaughter House* cases in the 1870s. This much is obvious and clear from the language used in other portions of the Constitution, such as the requirement that a member of the House of Representative have, among other things, “been seven Years a **Citizen of the United States**,” or that only a “natural born Citizen, or a **Citizen of the United States**, at the time of the Adoption of this Constitution” was eligible for the office of the Presidency. George Washington obviously thought of us as citizens of the United States,

“*The citizens of the United States of America have the right to applaud themselves for having given to mankind examples of an enlarged and liberal policy worthy of imitation*... (Letter to the Hebrew Congregation of Newport, Rhode Island, September 9, 1790)

He further stated,

“*Citizens by birth or choice of a common country, that country has a right to concentrate your affections. The name of American, which belongs to you, in your national capacity, must always exalt the just pride of Patriotism, more than any appellation derived from local discriminations*.” (Farewell Address, September 19, 1796)

Even Jefferson, the author of the Kentucky Resolutions, noted the value of viewing the people of the United States as one people, however much they also may have been citizens of their respective states as well,

“*The ultimate arbiter is the people of the Union*.” (Letter to William Johnson, 1823)

And who can forget that even as staunch an anti-federalist as Patrick Henry, long before the Constitution was established, said that he was not a Virginian, but an American? Obviously, he was not rejecting his loyalty to Virginia, but adding to it his loyalty to the (then conceptual) idea of a federal union between the revolting colonies.

So yes, the Founders and the document they created clearly understood that our unalienable rights were held as citizens of the United States, and that no individual state could deprive any citizen of the United States of the rights inherent to them as human beings, created in God’s image. While the states (theoretically) were to retain the vast bulk of governmental powers and authorities, the ability to deprive their citizens of inherent liberties was not one of these. Our rights were “federalized” from the start because they transcend any one political entity and were the common property of all members of the commonwealth established by the federal union of the states.

Going even further, we should note that the protection of our inherent liberties was also “federalized” by the constitutional stipulations required of the states in Article IV, Sect. 4,

“*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence*.”

We need to understand that for the Founders, the idea of a republican form of government included, but went beyond, merely having some sort of representative scheme that was accountable to the people. Implicit in the idea of “republicanism” was also the affirmation of the unalienable rights of the people themselves, since respect for these was a necessary outflowing of the self-determination of the people. Hamilton, for instance, implied this when he wrote about those who opposed republicanism in favor of more autocratic forms of government such as prevailed in Europe at the time,

“*From the disorders that disfigure the annals of those republics the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty*.” (Federalist No. 9)

In Hamilton’s mind, the value of republics was not only in their *form* of government (i.e. the specific ordering of powers and offices) but in the fact that republics were (ideally) intimately associated with civil liberty, the ability of the individual to enjoy the use of his unalienable rights within the political organization in which he exists. Jefferson also felt this way about the republican form of government,

“*From the moment that to preserve our rights a change of government became necessary, no doubt could be entertained that a republican form was most consonant with reason, with right, with the freedom of man, and with the character and situation of our fellow citizens*.” (Reply to the Virginia Legislature, 1809)

“*To establish republican government, it is necessary to effect a constitution in which the will of the nation shall have an organized control over the actions of its government, and its citizens a regular protection against its oppressions*.” (Letter to Lafayette, 1816)

Hence, republicanism and the civil liberties of the people, over and against the oppressions of government, were intertwined in Jefferson’s understanding.

It follows from this that the requirement for republicanism on the part of the state governments (a federal imposition) included, for the Founders, a respect for and maintenance of the individual liberties of the people in each respective state. Any state which did not, by whatever means, refrain from infringing upon the individual liberties of its citizens (who were also citizens of the United States) was, by definition, not maintaining a republican form of government. It was not enough to merely have an outward framework of republican offices and forms—the inner reality of the republican spirit of liberty had to be there as well. That this was rightly maintained by the federal charter, Madison expressed most eloquently when he wrote,

“*Every man who loves peace, every man who loves his country, every man who loves liberty ought to have it ever before his eyes that he may cherish in his heart a due attachment to the Union of America and be able to set a due value on the means of preserving it*.” (Federalist No. 41)

Clearly, Madison viewed the union of the states (and therefore the Constitution which chartered that union) as the safeguard to liberty. That this has not subsequently been the case, as we all can attest, is directly relatable to the failure of subsequent generations to maintain *proper respect* for the Constitution, but not to the Constitution itself. It is not foreign, then, to that document to suppose the “federalization” of protection for our unalienable rights. This safeguard was understood to be implicit within the document itself, even before the addition of the Bill of Rights was made. Hamilton noted this,

“*I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?*” (Federalist No. 84)

Here, we see Hamilton arguing *against* the inclusion of a Bill of Rights. His reason for doing so was that such a bill was indeed quite unnecessary, since the Constitution already contained within itself sufficient guarantee of each citizen’s natural liberties. Further, he even thought such a bill would be dangerous because it could open the door to unscrupulous actors who would use the wording of the negative rights of the bill to invent other, positive “rights.” So, absent a Bill of Rights, on what could Hamilton claim that the Constitution protects our natural liberties? One obvious way would be through its establishment of republican government at the federal level, and its demand for republican government at the state level. Indeed, throughout this particular Federalist essay, Hamilton makes the point that the Constitution already guarantees each individual’s liberties through the very fact of its popular establishment, apparent even in the preambulatory statement, “We, the People of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of [America](http://canadafreepress.com/index.php/article/24879).”

The entire document was about guaranteeing liberty—not through the states, but through the *federal* charter. The states had to institute forms of government which would affirm these liberties, and the subsequently attached Bill of Rights made explicitly clear what many (though not all, as the 9th amendment makes clear) of these liberties were.

As such, the 14th amendment, which prohibits states from infringing on our liberties, is wholly consistent, at least on this point, with the spirit of the Constitution as it was originally intended. I am a supporter of states’ rights. I would consider myself a [strong](http://canadafreepress.com/index.php/article/24879) proponent of the 10th amendment. I firmly believe in the principles of federalism that our Founders instituted. This, however, is specifically and exactly why I do not view this to be a “states’ rights” issue—it clearly is not. The protection of our unalienable liberties is guaranteed by the federal Constitution, and the states are required to be in alignment with that protection, and were from the very beginning.

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